IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 22, 2009 Session

REBECCA GAIL WILHOITE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Moore County
No. 919 Robert Crigler, Judge

No. M2008-01958-CCA-R3-PC - Filed June 23, 2009

The Petitioner, Rebecca Gail Wilhoite, pleaded guilty to one count of second degree murder and one count of especially aggravated robbery, both Class A felonies. As part of her plea agreement, she was sentenced as a Range II, multiple offender to forty years for her second degree murder conviction and twenty years for her especially aggravated robbery conviction, those sentences to be served concurrently in the Department of Correction. She now appeals from the Moore County Circuit Court's order denying her post-conviction relief. She argues that this denial was error because: (1) she was not granted funds to hire an expert witness on the subjects of battered woman syndrome and post-traumatic stress disorder; and (2) she received the ineffective assistance of counsel and consequently entered her pleas involuntarily and unknowingly. After our review, we affirm the decision of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Greg B. Perry, Manchester, Tennessee, for the appellant, Rebecca Gail Wilhoite.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Charles Crawford, District Attorney General; and Hollyn Eubanks and Ann L. Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner was originally charged with first degree murder and especially aggravated robbery. See Tenn. Code Ann. §§ 39-13-202, -403. She pleaded guilty to one count of especially aggravated robbery and one count of second degree murder, each a Class A felony. See Tenn. Code

Ann. § 39-13-210, -403. The State gave the following recitation of the facts underlying this case at the Petitioner's March 27, 2007 guilty plea acceptance hearing:

> On the 28th day of April, 2006, Faye Riddle discovered the body of Mr. Roscoe Philpot, her father, lying in an outbuilding at his place of residence at 4947 Cobb Hollow Road here in Moore County, Tennessee.
>
> Mr. Philpot had clearly been murdered. He was a 93[-]year-old gentleman, a good man who was a life-long resident of Moore County.
>
> He had the good fortune to still live at his own home. He . . . was legally blind.
>
> Ms. Riddle was his daughter. She went next door to a neighbor's house and called 911. The Moore County Sheriff's Department responded to Mr. Philpot's residence and secured the scene. The TBI was notified. Special Agent Gene Stegall, Sheriff Mark Logan and members of the Moore County Sheriff's Department worked and processed this murder scene.
>
> There were certain details about the scene which caught the attention of law enforcement. Included in those were materials and items used by laborers who had been working at Mr. Philpot's residence were gone and Mr. Philpot was wearing rain gear though the 28th was not a rainy day nor had the previous day been raining.
>
> Investigation revealed that earlier in the week it had rained. Investigation also revealed that there had been two laborers doing brick work for Mr. Philpot and that these men were Thomas Smith and his brother Robert Owen Smith.
>
> A truck had been seen leaving the Philpot residence during the timeframe that had been established for the murder. A description of the truck allowed it to be traced to a Mr. Leon Robertson in Coffee County. Mr. Robertson is [the Petitioner's] father.
>
> The defendant Robert Owen Smith and [the Petitioner] had used the truck to go to Mr. Philpot's residence. Smith was determined to get money that he believed Mr. Philpot owed him. Smith needed this money, he believe [sic], because he was out of Dilaudid pills and wanted to buy some more.
>
> Smith told [the Petitioner] that he was going to get the money by any means necessary.

> These facts are known by the State because of two statements made by [the Petitioner] to law enforcement agency [sic] and also remarks that she made while in custody to another inmate.
>
> Smith and [the Petitioner] both participated in planning and purchasing items that were used in the murder. They went shopping for these items in Tullahoma immediately prior to going to the residence of Mr. Philpot. Purchased there were a hammer, gloves and a rope.
>
> Upon arrival at Mr. Philpot's residence Smith and [the Petitioner] made contact with him.
>
> Mr. Philpot had been going to give them some old furniture and on the pretext of examining or getting the furniture, he was lured to the outbuilding by [the Petitioner] for the purpose of committing the crime. She watched while Mr. Philpot was murdered. Robert Owen Smith attacked Mr. Philpot using a hammer. Killed him and robbed him of his money, leaving his rain suit pulled aside and his regular clothes exposed.
>
> Examination of Mr. Philpot by the medical examiner revealed multiple blunt force injuries to the head as the cause of death. Manner of death was homicide.
>
> Robert Owen Smith and [the Petitioner] were both located, informed of their rights and interviewed. Both gave full statements.

The Petitioner filed a petition for post-conviction relief on March 19, 2008. After being appointed counsel, she filed an amended petition on April 30, 2008. She also filed an ex parte motion requesting funds for the purpose of hiring an expert to testify at her post-conviction hearing regarding battered woman's syndrome and post-traumatic stress disorder. This motion was denied.

The Petitioner testified at her July 25, 2008 post-conviction hearing. She first established that, pursuant to the terms of her plea agreement, she had been sentenced to serve forty years at 100% for her second degree murder conviction. She had also been sentenced to serve twenty concurrent years for her especially aggravated robbery conviction.

She also gave her version of the events underlying this case. She said that she was romantically involved with Robert Owen Smith. They have two children together. Smith regularly abused the Petitioner both physically and emotionally; he had, at various times, burned her with cigarettes, choked her, locked her in a closet, broken her ankle and fingers, raped her, and beaten her. Smith had also threatened to kill or take their daughters should the Petitioner ever leave him or tell anyone about his treatment of her.

The Petitioner also testified that she and Smith drove to Mr. Philpot's residence on the day of the murder. At that time, she was aware that Smith and his brother Thomas had been doing some work for Mr. Philpot. On the way to their destination, Smith stopped at a store, where he purchased a pair of gloves, some rope, and a hammer. The Petitioner waited in the vehicle's passenger seat. Because Smith regularly worked as a handyman, the Petitioner did not think there was anything unusual about these purchases. Smith and the Petitioner drove to Mr. Philpot's residence, at which point Smith killed Mr. Philpot. The Petitioner did not know he was planning to do so. The Petitioner was arrested two or three days later; she had not told the police about Smith's crime because he had threatened to kill her or their daughters if she did so.

The Petitioner also testified that an attorney was appointed as her defense counsel. According to the Petitioner, defense counsel first visited her at the Moore County Jail on the day of her preliminary hearing. In their five-to-ten-minute discussion, defense counsel informed the Petitioner of the charges against her but did not discuss defense strategy. The Petitioner said she was charged with felony murder and accessory after the fact at her preliminary hearing and that defense counsel never informed her that the charges changed once her case reached the grand jury. On two occasions, defense counsel failed to appear at a court date, resulting in postponements.

Between her preliminary hearing and the time she accepted her plea agreement, the Petitioner said she only saw defense counsel for a few brief in-court talks and for one other five-to-ten-minute visit at the Moore County Jail. Defense counsel never explained to the Petitioner that she could be convicted of lesser-included offenses, and he did not discuss the possibility of hiring an expert witness to testify regarding post-traumatic stress disorder or battered woman syndrome. Defense counsel also never told her that tests revealed Mr. Philpot's body and clothes to be negative for the Petitioner's DNA. The Petitioner was subjected to an exam for the purpose of determining her mental competency to stand trial, but defense counsel never told her the results. Defense counsel also failed to discuss potential mitigating factors that might apply to the Petitioner and failed to tell her that a jury could consider whether she was under the dominion and control of another at the time she committed her crime.

On the day the Petitioner entered her guilty plea, defense counsel told her that the district attorney general would seek the death penalty if the case went to trial. He also told her that the district attorney general had a jailhouse witness available to testify against her. Defense counsel did not tell the Petitioner what this witness would say. Defense counsel apparently gave the Petitioner a copy of the witness' statement. The Petitioner cannot read well, however, so she was unable to read the statement. She also had learning disabilities, was slow to understand things, and was consequently in developmental classes in high school.

Defense counsel told the Petitioner that she had "no other option but to plead guilty," and he gave her only a few minutes to decide. The Petitioner was scared, apparently of Smith, and decided to plead guilty only because of her fear. The Petitioner agreed, however, that in her plea acceptance hearing she was questioned as follows after the district attorney general summarized its proof:

[The Court]: [Petitioner], did you just hear what [the district attorney general] said happened?

[The Petitioner]: Yes, sir.

[The Court]: Is that what in fact happened?

[The Petitioner]: Yes, sir.

[The Court]: Are you in fact guilty of both of these offenses?

[The Petitioner]: Yes, sir.

[The Court]: Second degree murder and especially aggravated robbery are both A felonies . . . do you understand the full range of punishment for second degree murder and especially aggravated robbery?

[The Petitioner]: Yes, sir.

. . . .

[The Court]: Did [defense counsel] explain what these ranges are to you . . . ?

[The Petitioner]: Yes, sir.

. . . .

[The Court]: Do you understand the possible punishment for the indicted offense of first degree murder?

[The Petitioner]: Yes, sir.

[The Court]: Did you hear [the district attorney] announce the proposed settlement, which I asked you about just a minute ago?

[The Petitioner]: Yes, sir.

[The Court]: Do you want me to accept your pleas of guilty pursuant to that settlement?

[The Petitioner]: Yes, sir.

. . . .

[The Court]: . . . [W]hat is your plea to the amended charge of second degree murder in count 1; guilty or not guilty?

[The Petitioner]: Guilty.

[The Court]: What is your plea to count 3, especially aggravated robbery?

[The Petitioner]: Guilty.

[The Court]: Are both of those guilty pleas your free and voluntary decision?

[The Petitioner]: Yes, sir.

[The Court]: Have you been promised anything other than the agreement just announced here in open court to get you to plead guilty?

[The Petitioner]: No, sir.

[The Court]: Have you been threatened in any way to get you to plead guilty?

[The Petitioner]: No, sir.

. . . .

[The Court]: Do you understand by pleading guilty there will be no further trial of any kind so that by pleading guilty you are waiving your right to trial and to jury trial. Do you understand that?

[The Petitioner]: Yes, sir.

[The Court]: Do you have any complaints about the way and manner in which [defense counsel] has represented you?

[The Petitioner]: No.

[The Court]: Have you had any difficulty communicating with him about your case?

[The Petitioner]: No, sir.

[The Court]: Have you been able to talk with him all that you want in order to decide to plead guilty pursuant to this agreement today?

[The Petitioner]: Yes, sir.

[The Court]: Is there anything he could have done to research or investigate this case that you can think of that he has not done?

[The Petitioner]: No, sir.

The Petitioner maintained at her post-conviction hearing that she answered these questions as directed to by defense counsel. On cross-examination, however, she said that she was lying at the plea hearing when she stated that she understood her plea and all associated documents. She also stated that she could read and write at no higher than a second grade level.

Robert Owen Smith testified for the Petitioner's at her post-conviction hearing. He first confirmed that he too had been charged with first degree murder and especially aggravated robbery, and had pleaded guilty to second degree murder and especially aggravated robbery. He said the Petitioner had not known he was planning to rob and kill Mr. Philpot. He confirmed that he had physically abused the Petitioner since 1984. Smith believed the Petitioner pleaded guilty because of fear, and he referenced a statement he made to police after his arrest in which he threatened to kill the Petitioner and their children.

The Petitioner's sister, Betty Robertson, also testified on the Petitioner's behalf. Ms. Robertson had, in the past, witnessed Smith striking the Petitioner. The Petitioner was very afraid of Smith. Ms. Robertson also said that the Petitioner had learning disabilities, and as a result, did not understand what was happening during the meeting in which she and defense counsel discussed the plea agreement, a meeting at which Ms. Robertson and her brother and father were also present. Ms. Robertson testified that this meeting lasted thirty-five to forty minutes.

The State presented Chris Flowers, a Department of Correction employee, as its first witness. He testified that he transported the Petitioner and Smith in a van on one occasion. During the thirty minute trip, he saw them conversing, although he could not hear what they were discussing.

The State also presented the testimony of the Petitioner's defense counsel ("Counsel"). Counsel testified that, because he was appointed to represent the Petitioner, he kept logs of his hours. These logs included the time he spent on court appearances, meetings, drafting documents, and other tasks. They did not include time he spent thinking about the case, and also did not include travel time to and from court appearances and meetings.

Counsel's logs reflected a total of twenty-seven hours spent on the Petitioner's case. Counsel estimated that ten of those hours were spent with the Petitioner, including about five hours in court and five hours in jail. In early September 2006, Counsel first met with the district attorney general. On September 9, 2006, he spent two and a half hours meeting with the Petitioner, conferring with the district attorney general and Smith's defense counsel, and reviewing relevant files. On November 10, 2006, he drafted a scheduling order, talked to the district attorney general and the

sheriff, and arranged to have the Petitioner moved to the Moore County Jail so that he could see her more frequently. He also spoke to Smith's defense counsel again and determined that it would not be in the Petitioner's best interest to unify her defense with Smith's.

On November 29, 2006, Counsel again discussed the Petitioner's case with the district attorney general. On December 15, 2006, he spent one-and-a-half hours in court setting the Petitioner's case for trial. He then spent three hours talking to the Petitioner and her family about the case. On January 2, 2007, he spent two hours attempting to settle the case by talking to the Petitioner and the district attorney general.

By January 17, 2007, Counsel and the Petitioner had decided to go to trial in the Petitioner's case. They spoke for an hour about trial strategy. Counsel judged that their best strategy would be to defend the Petitioner as an accessory after the fact, thus catching the State unprepared. On February 23, 2007, Counsel attended an hour-long court appearance with the Petitioner. On March 20 and 21, he spent four hours exploring further settlement offers and discussing the case with the Petitioner. Having again decided against settling the case, Counsel spent four-and-a-half hours on March 25, 2007, preparing the Petitioner for trial.

Counsel testified that he thoroughly investigated the facts of the Petitioner's case. Throughout his meetings with the Petitioner, Counsel discussed the charges against her as well as potential defenses. He discussed lesser-included offenses and accomplice liability. He took the Petitioner's "fair to below fair" intelligence into account, and he believed that, with the occasional assistance of her family members, she understood the information and advice she received from him. Counsel discussed with the Petitioner the possibility of using post-traumatic stress disorder and battered woman syndrome to support an alternate duress defense at trial, although he did not specifically discuss hiring an expert to testify regarding those matters.

Counsel entered his time-log into evidence. He also recalled that the Petitioner's preliminary hearing lasted three-and-a-half hours because the court consistently overruled the State's relevancy objections. As a result, Counsel was able to obtain a large amount of discovery information about the State's case, including Mr. Philpot's autopsy report, which Counsel said was "horrific" and would have been a disadvantage at trial.

On March 26, 2007, the district attorney general approached the Petitioner and Counsel, informing them that the State would ask for the death penalty if the Petitioner did not plead guilty to first degree murder and especially aggravated robbery. Counsel explained to the Petitioner that the death penalty requires a unanimous verdict. In support of the plea ultimatum, the district attorney general gave Counsel a piece of evidence that "changed the whole complexion of the case": a statement by a Marshall County Jail inmate recounting a confession the Petitioner made to her before Counsel had the Petitioner transferred to Moore County. Counsel read the statement, which we reproduce in relevant part:

> [The Petitioner] began by telling me that she "never should have done it," and I asked what she was talking about. [The Petitioner] said that she and her "boyfriend," who she also called her "babies' daddy," had developed a plan to rob a "rich old man in Moore County." She said that they bought a hammer at Home Depot. [The Petitioner] said that after she and her boyfriend arrived at the old man's house, she tricked him (the old man), and led him into a garage where her boyfriend was waiting with the hammer. [The Petitioner] said that the old man trusted her. While telling me this, [the Petitioner] told me not to tell, and also said that she had been told by her attorney not to talk about her case. After leading him inside (the old man), [the Petitioner] said that her boyfriend killed him with the hammer. [The Petitioner] did not say exactly where she was while her boyfriend was killing the old man, but she did not indicate that she left the garage after leading the old man inside. [The Petitioner] also said that the old man was 92 years old, and that she and her boyfriend knew it wouldn't take much to kill him. [The Petitioner] said that they took about $500 off the old man after he had been killed. [The Petitioner] also said that her boyfriend had threatened to kill her and hurt her kids if she didn't help him (the boyfriend) after the murder.
>
> [The Petitioner] added that afterwards, she told the investigators that she could not read or write. However, she told me that she really could. I also know she can read and write, because I have observed her reading and taking notes in our jail church services (Bible study). I asked [the Petitioner] why they did this to the old man, and she said because her boyfriend was "high," and he wanted more money for more meth.

Counsel also read the statement to the Petitioner and explained its legal significance. Although many of the facts of the Petitioner's case had been made public in her preliminary hearing, Counsel testified that the statement contained many non-public details. Its credibility would thus be difficult to impeach. Counsel suggested that the Petitioner plead guilty. He did not exert pressure on her, however. After discussing the matter with Counsel and her family, the Petitioner agreed to plead guilty to second degree murder and especially aggravated robbery. Counsel explained to her that she would be required to serve the full forty years of her second degree murder sentence under the plea agreement. He did not order her to look at him for instructions during her plea acceptance hearing. The Petitioner pleaded guilty in accordance with the plea agreement.

Subsequent to the hearing on the petition for post-conviction relief, the post-conviction court entered an order denying relief, which included findings of fact and conclusions of law. It is from the order denying post-conviction relief that the Petitioner appeals.

Analysis

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not

reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

Once a guilty pleas has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance of counsel necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. Hill v. Lockhart, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

When a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must "canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s]." Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set for the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, "(a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of the guilty plea." Mackey, 553 S.W.2d at 341.

However, a trial court's failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to seek post-conviction relief. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specific constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). "Whether the additional requirement of Mackey were met is not a constitutional issue and cannot be asserted collaterally." Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

I. Expert Funds

The Petitioner first contends that the post-conviction court erred in denying her funds to procure expert testimony about post-traumatic stress disorder and battered woman syndrome. She would have used her desired expert testimony to demonstrate that her guilty plea was not voluntarily or knowingly entered because she was in fear of Robert Smith.

The State "is not required to provide expert assistance to indigent non-capital post-conviction petitioners." Davis v. State, 912 S.W.2d 689, 696-97 (Tenn. 1995). The Petitioner appears to argue that her post-conviction case should be treated as a capital case, however, because the State's threat to file a death notice[1] was a significant factor in convincing her to accept a plea offer. In addition to the fact that this argument tends to undermine the Petitioner's claim that she pleaded guilty predominantly because she was in fear of Smith, we cannot ignore the non-capital Petitioner's status simply because she may have become a capital defendant had she chosen not to accept the plea offer. This issue is without merit.

We also note that the Petitioner was able to place in the record a substantial amount of evidence regarding her relationship with Smith and its effects on her mental state, including her own testimony of Smith's abuse and threats to her life and those of her children, Smith's corroborating testimony, and an affidavit filed by licensed psychiatrist Keith Caruso discussing the effects of rape and other domestic violence, particularly their potential to reduce a victim's ability to resist coercion. The post-conviction court thus was able to consider, and apparently rejected, evidence of Smith's domination of the Petitioner.

II. Voluntary and Intelligent Plea

The Petitioner next contends that the post-conviction court erred in concluding that her trial counsel's performance was not deficient, and that she therefore did not involuntarily or unknowingly plead guilty as a result of any deficiency. In doing so, the Petitioner relies heavily on her assertions in the post-conviction hearing that her trial counsel did not inform her of the possibility of using battered woman syndrome or post-traumatic stress disorder to support her defense. Counsel testified that he informed the Petitioner of the possibility of using those conditions to establish a duress defense if necessary. Because such a defense would require the Petitioner to admit involvement in the murder at issue, however, Counsel judged that a better defense strategy would be to argue that the Petitioner had, at most, been an accessory after the fact.

This Court must credit the post-conviction court's findings of fact unless the evidence preponderates against them. Momon, 18 S.W.3d at 156. The post-conviction court clearly credited Counsel's testimony over the Petitioner's, and we conclude that the evidence does not preponderate against its resulting finding that the Petitioner was informed of the charges against her, the potential penalties, the likelihood of success at trial, and potential defenses. We also note that a number of other disparities in the Petitioner's testimony likely affected her credibility, including her claims that Counsel met with her for a short time on only a few occasions and a witness' statement that the

[1] No death notice was ever filed.

Petitioner had confessed guilt to her and admitted that she was feigning illiteracy. Under these circumstances we conclude that the post-conviction court did not err in concluding both that Counsel's performance was within the required standard of reasonableness, see Strickland, 466 U.S. at 688, and that the Petitioner pleaded guilty voluntarily and knowingly. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's denial of post-conviction relief.

_____

DAVID H. WELLES, JUDGE